IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 237 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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IND BANK MERCHANT BANKING SERVICES LTD. - Petitioner(s)
Versus
ORIENT RESORTS (INDIA) LTD. - Respondent(s)

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Appearance :

MR NR PARIKH for Petitioner(s) : 1,MR DHARMESH V SHAH for Petitioner(s) : 1,
MR SUDHIR M MEHTA for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 08/02/2007

ORAL JUDGMENT

This Company Petition is filed by the petitioner, Ind-Bank Merchant Banking Services

Ltd., to wind up the respondent Company, M/s. Orient Resorts (India) Pvt.Ltd., under the provisions of the Companies Act, 1956, and to appoint the Official Liquidator.

2. It is the case on behalf of the petitioner that the petitioner Bank granted Hire Purchase facility to the respondent Company for Rs. 54,50,000 for a period of 6 years for taking on hire various machineries. That against the said Hire Purchase facility the respondent Company has signed and executed Hire Purchase Agreements dated 24th October 1997. The representative of the Respondent Company also in security of the aforesaid Hire Purchase facility signed and executed a Demand Promissory Note of Rs. 92,20,092 in favour of the petitioner. It is further submitted that the said Company has on 25th October 1997 deposited with the petitioner Title Deeds of its property to secure due payment against the Hire Purchase facility granted by the petitioner. It is submitted that the respondent Company has failed and neglected to pay the

equated monthly installments aggregating to Rs. 1,51,92,944.96 Nps., up to 3.8.2004 including interest payable by the said Company to the petitioner under the said Hire Purchase facility inspite of repeated requests and demands and therefore the petitioner served a legal notice dated 28th June 2004 upon the petitioner and terminated the said Hire Purchase Agreement. It is submitted that inspite of service of statutory notice calling upon the respondent Company to make payment of its dues of Rs. 1,49,87,759.87 Nps., up to 31.5.2004, neither there was any reply to the statutory notice nor any payment has been made. It is submitted that the respondent Company is unable to pay its debts and therefore the Company is required to be ordered to be wound up by this Court. It is further submitted that against the net-worth the accumulated losses are more thereby indicating that the net-worth of the Company is completely eroded. It is submitted that even the respondent Company has disposed of items forming part of the amusement and water-parks set-up in 1994-1995. It is submitted that

the respondent Company has not taken petitioner's permission for disposal of its assets. It is further submitted that even there is diversion of funds and the conduct of the respondent Company is prejudicial to the interests of the creditors. It is further submitted that some of the group companies have been classified as 'Non Performing Assets' by the lenders and the lenders have filed suit against them to recover their dues. It is submitted that the respondent Company has lost its financial substratum and therefore it is requested to allow the present Company Petition and to pass an appropriate order of winding up of the respondent company.

3. The petition is opposed by the respondent. Shri Sudhir Mehta, learned advocate appearing on behalf of the respondent Company. It is submitted by him that as the Civil Suit is already filed for recovering the amount from the respondent, it is submitted that once the petitioner has already availed of another remedy

this Company Petition be not entertained. It is further submitted by him that if the petitioner agrees to accept lesser amount and/or to give some concession and also to waive interest in that case the respondent company will make payment in installments. It is further submitted that at present the respondent company is a running company and has not lost its financial substratum. Relying upon the last Balance Sheet and the Statement [Page No.97 of the compilation], it is submitted that the respondent Company is trying its best to come out of financial crunch and therefore it is requested not to pass an order of winding up and to grant installments.

4. The learned advocate appearing onbehalf of the respondent Company has relied upon the following decisions;

(i) ***State Trading Corporation of India Ltd. Vs. Punjab Tanneries Ltd., reported in***

[1989] 66 Company Cases Page 634 (P & H).

(ii) ***K.C.P. Ltd. Vs. Prudential Sugar Corporation Ltd., reported in [2005] 127 Company Cases 66 (A.P.).***

5. Heard the learned advocates appearing on behalf of the respective parties. It is the case on behalf of the petitioner that an amount of Rs. 1,51,72,944.96 ps., is due and payable as outstanding installments under Hire Purchase Agreement. The petitioner served a statutory legal notice upon the respondent Company as required under Section 434 of the Companies Act, 1956. Inspite of service of statutory notice there was no reply to the said notice. The amount claimed in the statutory notice has not been disputed. Inspite of the service of notice neither any payment has been made nor the respondent Company has come out with any proposal to make payment. It is the case on behalf of the respondent that if some time is granted and

interest is waived and some lesser amount is accepted the respondent company is ready and willing to make the payment in installments. Thus, it appears that debt is not disputed. The petitioner is a Bank who has advanced finance and the respondent Company has entered into Hire Purchase Agreement. The submission on behalf of the respondent Company is that if some lesser amount is accepted and interest is waived in that case the respondent company is ready and willing to make payment in installments. It is afraid this Court cannot direct the petitioner to agree to accept a lesser amount and waive the interest amount. Once the Hire Purchase Agreement was executed by the respondent Company and has taken the finance and under the Hire Purchase Agreement the installments are to be paid, it is not open for the respondent Company to submit that they will pay a lesser amount and that too in installments and that too without any interest. Whatever the amount is required to be paid by the respondent Company under Hire Purchase Agreement

the respondent company is bound to make the payment.

6. It is the contention on behalf of the respondent Company that as the petitioner has already filed a civil suit it is not open for the petitioner company to file the present Company Petition and the present company petition is not required to be entertained. For that purpose, the Judgment of the Punjab and Haryana High Court in the case of ***Punjab Tanneries Ltd.,[supra]*** has been relied upon. On going through the said Judgment, it is evident that there is no proposition of law laid down by the Punjab and Haryana High Court that once the civil suit is filed the company petition is not required to be entertained. What is held by the Punjab & Haryana High Court in the said decision is that the winding up proceedings are discretionary and the petitioner was not entitled *ex debito justitiae* to an order of winding up of the company, on the mere plea that the debt was not

paid. The Punjab & Haryana High Court also held that the machinery for winding up could not be allowed merely as a means for realising a debts due from the company. There is no dispute with regard to the proposition of law laid down by the Punjab & Haryana High Court. However, merely because a civil suit is filed the petitioner is not barred from filing a winding up petition under the provisions of the Companies Act, 1956 if all the conditions of winding up of a company under the provisions of Companies Act, 1956 are complied with. So far as the decision relied upon in the case of ***K.C.P. Ltd.[supra]*** of the Andhra Pradesh High Court is concerned, the same would not be applicable to the facts of the present case, as in the case before the Andhra Pradesh High Court the debt was not admitted and no prima facie proof of inability to pay the debt was on record.

7. In the case on hand, the amount of Rs. 1,51,72,944.96 ps., is due and payable and the

same is not disputed except the submission on behalf of the respondent that interest be waived and that the respondent company is agreeable for One Time Settlement if lesser amount is accepted and interest is waived and some installments are granted. It is required to be noted that this Court has specifically asked the learned counsel appearing on behalf of the respondent Company to come out with some amount to show their bonafides and thereafter some installments can be granted, however the learned advocate appearing on behalf of the respondent company has shown respondent's inability to pay any amount as on today. Thus, it appears that it is not possible for the respondent company to make any payment today. The financial position of the respondent company is such that it is unable to pay even part of the debt to the petitioner Bank. Opportunity was given to the learned counsel appearing on behalf of the respondent Company to make some payment to show their bonafides but the learned advocate appearing for the respondent Company has shown

the inability. Statutory notice as stated above has been served upon the respondent Company. There is no reply to the statutory notice. The amount mentioned in the statutory notice has not been disputed. Under the circumstances, the respondent Company has neglected to pay the debt to the petitioner company. Considering the above, it is clear that the respondent company has lost its financial substratum and is not in a position to pay its debts to the creditors inclusive of the petitioners. A huge sum of Rs. 1,51,72,944.96 ps., is due and payable to the petitioner Bank. In the facts and circumstances of the case, it appears to the Court that the respondent be ordered to be wound up.

8. For the reasons as stated above, the company petition is allowed. The respondent company is directed to be wound up. The Official Liquidator attached with this Court is appointed as Official Liquidator for the respondent company. The Official Liquidator is hereby

directed to take possession of the properties (movable or immovable) of the respondent company along with its Bank Accounts, Cheque Books, Cash, Account Books etc., after preparing the inventories and panchnama. The Official Liquidator shall submit his report within a period of three months. If required, he can take service of the Official Valuer for the purpose of preparation of inventory report, possession note etc. No costs.

[M.R. Shah, J.]

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